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**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

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| STEFANI SIMMONS,<br><br>Plaintiff and Appellant,<br><br>v.<br><br>MATHIAS FOBI et al.,<br><br>Defendants and Respondents. | B167678<br><br>(Los Angeles County<br>Super. Ct. No. VC033023) |

APPEAL from a judgment of the Superior Court of Los Angeles County. Daniel Solis Pratt, Judge. Affirmed.

Daniel M. Graham for Plaintiff and Appellant.

Reback, McAndrews & Kjar, James J. Kjar and Patrick E. Stockalper for Defendants and Respondents.

Plaintiff, Stefani Simmons, appeals from a judgment in favor of defendant, Mathias Fobi, M.D., following a court trial. Plaintiff has made the strategic decision not to proceed with a reporter's transcript of any of the proceedings and a clerk's transcript consisting of 85 pages, much of which consists of documents relevant only to post trial proceedings, proofs of service, and the superior court docket. Given the unusual posture of this appeal and the complete absence of any sound knowledge as to what even occurred in the trial court other than the belated filing of the statement of decision or any showing of prejudice, we affirm.

According to the superior court docket, on November 27, 2000, the complaint, which was not included in the clerk's transcript, was filed. The complaint, according to the docket, named eight defendants. The docket reflects that there were settlements as to various defendants. On January 6, 2003, presumably a court trial appears to have commenced according to the docket. The docket does not reflect who were the defendants at the court trial. The docket indicates the trial ended on January 29, 2003. As noted previously, no reporter's transcript of any proceedings has been provided.

On March 20, 2003, the trial court filed a document entitled "Judgment After Court Trial." The trial court's conclusion was, "Unfortunately, for the plaintiff she was a person that had known complications from her surgery but it cannot be said by a preponderance of the evidence that the operation or aftercare were below the standard of care." On April 1, 2003, plaintiff filed a request for statement of decision. The April 1, 2003, request stated, "In filing and serving this [r]equest, [p]laintiff is assuming the [c]ourt's 'Judgment After Court Trial' is meant to be the [c]ourt's ['t]entative [d]ecision[']  pursuant to [Code of Civil Procedure section] 632." On March 27, 2003, a notice of entry of judgment was served by defense counsel on the plaintiff's attorney, Daniel M. Graham. On April 1, 2003, plaintiff filed written objection to the notice of entry of judgment served March 27, 2003. The objection asserted the notice of entry violated plaintiff's Code of Civil Procedure section 632 rights. On April 3, 2003, defendant served a cost memorandum on Mr. Graham. The cost memorandum, which is

in the clerk's transcript, does not have a file stamp on it. Moreover, the docket does not reflect that the cost memorandum was ever filed.

On May 15, 2003, plaintiff filed a notice of appeal from the judgment. The notice of appeal refers to a judgment in favor of "[d]efendant." On June 18, 2003, an untimely record designation was filed. (Cal. Rules of Court, rule 5(a)(1).) No objection to the untimely designation was interposed and the record was prepared pursuant to plaintiff's request. Plaintiff only designated the following documents: the notice of appeal; the record designation; the judgment; the notice of entry of judgment; the April 1, 2003, request for a statement of decision; the objection to the notice of entry of judgment; and plaintiff's objection to the filing of the memorandum of costs. No reporter's transcript was designated. On July 15, 2003, the trial court filed a statement of decision. It responded to each of the issues raised in plaintiff's April 1, 2003, statement of decision.

On November 18, 2003, as part of the normal case processing in this court, the following order was issued, "The parties are to brief the issue of whether plaintiff's failure to designate a reporter's transcript or include other pertinent documents warrants affirmance on the inadequacy of the record. (*Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1295.)" On December 2, 2003, Mr. Graham advised the clerk of this court that the parties desired to have a prehearing settlement conference. The parties were unable to reach a settlement.

On appeal, plaintiff argues she is entitled to a reversal of the judgment because the belatedly filed statement of decision was reversible error. Additionally, plaintiff argues that the trial court had no authority to file the July 15, 2003, statement of decision. Plaintiff argues that the May 15, 2003, filing of the notice of appeal divested the trial court of the authority to later issue the July 15, 2003, statement of decision.

First, on November 18, 2003, prior to any briefing, we alerted plaintiff to the problem of a complete absence of what remotely would constitute an adequate record. For example, in numerous situations, appellate courts have refused to reach the merits of an appellant's claims because no reporter's transcript of a pertinent proceeding or a

suitable substitute was provided. (*Walker v. Superior Court* (1991) 53 Cal.3d 257, 273-274 [transfer order]; *Maria P. v. Riles*, *supra*, 43 Cal.3d at pp. 1295-1296 [attorney fee motion hearing]; *Ballard v. Uribe* (1986) 41 Cal.3d 564, 574-575 (lead opn. of Grodin, J.) [new trial motion hearing]; *In re Kathy P.* (1979) 25 Cal.3d 91, 102 [hearing to determine whether counsel was waived and the minor consented to informal adjudication]; *Vo v. Las Virgenes Municipal Water Dist.* (2000) 79 Cal.App.4th 440, 447-448 [trial transcript when attorney fees sought]; *Estate of Fain* (1999) 75 Cal.App.4th 973, 992 [surcharge hearing]; *Interinsurance Exchange v. Collins* (1994) 30 Cal.App.4th 1445, 1448 [monetary sanctions hearing]; *Hodges v. Mark* (1996) 49 Cal.App.4th 651, 657 [nonsuit motion where trial transcript not provided]; *Null v. City of Los Angeles* (1988) 206 Cal.App.3d 1528, 1532 [reporter's transcript fails to reflect content of special instructions]; *Buckhart v. San Francisco Residential Rent etc. Bd.* (1988) 197 Cal.App.3d 1032, 1036 [hearing on Code Civ. Proc., § 1094.5 petition]; *Sui v. Landin* (1985) 163 Cal.App.3d 383, 385-386 [motion to dissolve preliminary injunction hearing]; *Rossiter v. Benoit* (1979) 88 Cal.App.3d 706, 713-714 [demurrer hearing]; *Calhoun v. Hildebrandt* (1964) 230 Cal.App.2d 70, 71-73 [transcript of argument to the jury]; *Ehman v. Moore* (1963) 221 Cal.App.2d 460, 462-463 [failure to secure reporter's transcript of settled statement as to offers of proof].) Additionally, in the present case, virtually none of the pleadings have been provided by plaintiff who has been given the opportunity to fully brief this issue.

The consequences of the strategic decision not to supply us with most of the record are profoundly far reaching. To begin with, as asserted by defendant, based on the authority in the immediately preceding paragraph, we must affirm the *merits* of the trial court's judgment in favor of defendant. In the absence of a reporter's transcript, it is presumed that the evidence adduced at trial would support the judgment and demonstrate an absence of error; i.e., the judgment is correct including the amount of costs incurred by defendant. (*Estate of Fain*, *supra*, 75 Cal.App.4th at p. 992; see Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2003) ¶ 8:17, p. 8-5 (rev. #1,

2003).) Hence, if we were to reverse, all that would occur would be that the trial court would refile its statement of decision. Our decision on the merits of the appeal would be entitled to res judicata effect. (*Ernst v. Municipal Court* (1980) 104 Cal.App.3d 710, 715 ["the appellate department's decision remanding the case for a new trial was res judicata on the issue of whether or not a retrial would constitute double jeopardy"]; *Hardy v. Hardy* (1960) 181 Cal.App.2d 317, 320 ["the right of Marilyn and her child to share in the corpus of the trust was established on the prior appeal and is now res judicata"].) In a subsequent appeal, we would be required to required to affirm the judgment. Appellate courts do not engage in such idle acts. (*In re Matter of Vincent S.* (2001) 92 Cal.App.4th 1090, 1093-1094 ["remand for another hearing would constitute an idle act; and the law does not require idle acts"]; *People v. Coelho* (2001) 89 Cal.App.4th 861, 889 ["reviewing courts have consistently declined to remand cases where doing so would be an idle act that exalts form over substance"]; *Staples v. Hoefke* (1987) 189 Cal.App.3d 1397, 1415 ["Having delivered the good news to plaintiff that nonsuit was erroneously granted . . . , we now must also deliver the bad news: reversal is an idle act and does not necessarily compel retrial"]; *People v. Haskins* (1985) 171 Cal.App.3d 344, 350 ["The law does not require idle acts"]; *Jones v. Daly* (1981) 122 Cal.App.3d 500, 511 ["Inasmuch as the opinion of this court is the equivalent of an express declaration to that effect, reversal of the judgment of dismissal as to the first cause of action would serve no purpose and would simply constitute an idle act"]; *Consolidated, Inc. v. Northbrook Ins. Co.* (1979) 92 Cal.App.3d 888, 893, ["it is clear that the reversal of the judgment would serve no useful purpose and would simply constitute an idle act"].) Hence, the inadequate record plus the presumption in any later proceedings that no reversible error occurred warrants affirmance.

Second, the untimely compliance with the requirements of Code of Civil Procedure section 632 and California Rules of Court, rule 232 is entirely harmless. (Cal. Const., art. VI, § 13 ["No judgment shall be set aside . . . for any error as to any matter of procedure"]; *In re Marriage of Goddard* (2004) 33 Cal.4th 49, 57, fn. 4.) Plaintiff has

failed to demonstrate any prejudice from the belated filing of the statement of decision. Reversal is therefore unwarranted.

The judgment is affirmed. Defendant, Mathias Fobi, is to recover his costs incurred on appeal from plaintiff, Stefani Simmons.

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TURNER, P.J.

I concur:

GRIGNON, J.

MOSK, J., Dissenting.

I respectfully dissent. The trial court's failure to file a timely requested statement of decision while it had jurisdiction to do so constituted per se reversible error. Therefore, I would reverse and remand the matter to the trial court to enter a statement of decision and judgment in accordance with the procedure set forth in Code of Civil Procedure section 632 and rule 232 of the California Rules of Court, from which judgment plaintiff could appeal and designate a complete record for review of the merits.

***A. Procedural Background***

Plaintiff's medical malpractice claims were tried in a bench trial over 12 court days. On January 29, 2003, the trial court took the matter under submission. The superior court file shows there was no activity in the case following submission for two months, until March 20, 2003, when the trial court filed a document entitled "Judgment After Court Trial." The clerk's certificate of mailing states that the clerk mailed this document to the parties' attorneys on that same date, although the clerk refers to the document as "Court's Decision."

On April 1, 2003, plaintiff filed two documents. The first was a request for a statement of decision, in which plaintiff identified 12 controverted issues for which plaintiff requested a statement of decision under section 632. The second document was an objection to defendants' notice of entry of judgment, in which plaintiff objected on the ground that defendants' notice "violates Plaintiff's rights based upon Code of Civil Procedure §632." On April 7, 2003, the trial court ordered counsel for defendants to prepare a statement of decision "based on plaintiff's request for Statement of Decision pursuant to Code of Civil Procedure section 632."

On May 15, 2003—56 days after the superior court clerk mailed the judgment to the parties' attorneys—plaintiff filed a notice of appeal from the judgment. At that time, defendants had yet to submit a proposed statement of decision, and the trial court had yet to file any statement of decision. Six weeks later, on June 26, 2003, defendant Fobi filed

a designation of clerk's transcript. Included in that designation is a document *that was not yet in existence*. The last document listed in the designation is listed as follows: "Proposed Statement of Decision (To be filed on or about July 1, 2003)."

On July 1, 2003, defendants submitted their proposed statement of decision, and on July 15, 2003, the trial court signed and filed it.

### *B. A Statement of Decision Must Be Filed If Timely Requested, And Failure To Follow Procedure Constitutes Reversible Error*

When a trial more than eight hours long is conducted before the court, rather than a jury, the trial court must issue a tentative decision. (Cal. Rules of Court, rule 232, subd. (a).) The tentative decision may be announced orally in court and entered into the minutes, or it may be in writing and filed with the clerk of the court, who must mail it to the parties to the action. (*Ibid.*) Within 10 days after the tentative decision is announced (or within 15 days if a written tentative decision is mailed to the parties [see *Staten v. Heale* (1997) 57 Cal.App.4th 1084, 1090]), any party to the action may request a statement of decision, specifying those controverted issues as to which the party is requesting a statement of decision. (Code Civ. Proc., § 632.) If a statement of decision is timely requested, the trial court must issue a written statement of decision unless the parties appearing at the trial agree otherwise. (*Ibid*.)

Rule 232 of the California Rules of Court (Rule 232) sets out the procedure to be followed once a statement of decision is timely requested. That rule provides that any party appearing at the trial may, within 10 days of the request, make proposals as to the content of the statement of decision. (Rule 232, subd. (b).) A proposed statement of decision must be prepared and mailed to the parties within 15 days after the expiration of time for proposals as to the content of the statement of decision; the proposed statement of decision may be prepared by the trial court, or the trial court may designate a party to prepare it.[1] Once a proposed statement of decision has been served, any party affected by

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[1] If the trial court designates a party to prepare the proposed statement of decision after the expiration of the time for proposals as to its contents, that party must serve and

the judgment may, within 15 days after that service, serve and file objections to the proposed statement of decision. (Rule 232, subd. (d).) The trial court is not required to hold a hearing on the proposals or objections (Rule 232, subd. (f)), and the court may by written order extend any of the time limits described above or may, for good cause, excuse noncompliance with the time limits (Rule 232, subd. (g)).

It has been said that it is "vitally important" that a statement of decision prepared in conformity with the above procedure be issued if a statement of decision is timely requested. (*Miramar Hotel Corp. v. Frank B. Hall & Co.* (1985) 163 Cal.App.3d 1126, 1129.) The point of a statement of decision is to make sure the trial court justifies its decision, and preparing the statement of decision could affect the trial court's ultimate decision. When a trial court enters judgment without issuing a statement of decision when one is timely requested, the court commits per se reversible error. (*Id.* at pp. 1129-1130; see also *In re Marriage of Davis* (1983) 141 Cal.App.3d 71, 75.)

### *C. The Trial Court Had No Jurisdiction To Enter The Statement of Decision After The Notice Of Appeal Was Filed And The Record Designated*

Defendants argue that reversal is not required in this case because the trial court eventually did issue a statement of decision. But even if a trial court could correct its error in filing a judgment without issuing a statement of decision (but see *In re Marriage of Davis*, *supra*, 141 Cal.App.3d at p. 77 ["'A judgment entered without findings where findings are required is a nullity …' [citation], and findings signed and filed after entry of such a judgment cannot resurrect it"]), in the present case, the trial court did not have jurisdiction to issue the statement of decision when it purported to do so—after judgment was entered and a notice of appeal from that judgment was filed. (*Ramon v. Aerospace Corp.* (1996) 50 Cal.App.4th 1233, 1238 [trial court does not have power to correct judicial error after judgment is entered]; *Betz v. Pankow* (1993) 16 Cal.App.4th 931, 938

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submit the proposed statement of decision within 15 days after receiving notice of the designation. (Rule 232, subd. (c).)

[trial court deprived of jurisdiction to conduct proceedings that may affect judgment after notice of appeal is filed]; Code Civ. Proc., § 916.) Although a trial court has inherent power to correct a clerical error at any time, including while an appeal is pending (*People v. Mitchell* (2001) 26 Cal.4th 181, 185), issuing a statement of decision that did not exist until four months after judgment was entered, or two months after an appeal was taken, cannot be considered a correction of a clerical error (*Bed, Bath & Beyond of La Jolla, Inc. v. La Jolla Village Square Venture Partners* (1997) 52 Cal.App.4th 867, 883-884). Instead, it was a postjudgment attempt to correct a judicial error while that judgment was on appeal.

### *D. Plaintiff Designated An Adequate Record And Was Not Required To Show Prejudice; But Even If She Were So Required, Prejudice Was Established*

The absence of a reporter's transcript is irrelevant in this case because the failure of a trial court to issue a statement of decision when one is timely requested constitutes per se reversible error. (*Miramar Hotel Corp. v. Frank B. Hall & Co.*, *supra*, 163 Cal.App.3d at p. 1127 ["This case presents the question whether a trial court's failure to issue a statement of decision when there has been a timely request therefore is per se reversible error. We will conclude that it is"].) No showing of prejudice is required in such circumstances. (7 Witkin, Cal. Procedure (4th ed. 1997) Trial, § 415 [discussing *Miramar* and noting that "failure to issue a statement [of decision timely requested] is *reversible error per se*, i.e., calling for a reversal without the usual requirement of a showing of prejudice"]; see also *In re Marriage of Sellers* (2003) 110 Cal.App.4th 1007, 1010 ["The importance of the statement [of decision] is underscored by the rule that a trial court's failure to render a statement of decision is reversible error"]; *Gruendl v. Oewel Partnership, Inc.* (1997) 55 Cal.App.4th 654, 659-660 ["Failure to issue a statement of decision in response to a timely request therefor is reversible error"]; *Whittington v. McKinney* (1991) 234 Cal.App.3d 123, 127 ["When a party requests a statement of decision, it *must* be prepared, and the failure to do so is reversible error"];

*Social Service Union v. County of Monterey* (1989) 208 Cal.App.3d 676, 681 ["Where counsel makes a timely request for a statement of decision upon the trial of a question of fact by the court, that court's failure to prepare such a statement is reversible error"]; *In re Marriage of Davis*, *supra*, 141 Cal.App.3d at p. 75 ["Where findings are requested in a proceeding in which a litigant is entitled to findings, the court's failure to make findings on all material issues amounts to reversible error"]; Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2003) ¶ 8:25, p. 8-13 ["the omission [of a statement of decision following a timely request] is *reversible error per se*: On appeal, a judgment entered without the requisite statement of decision will result in *automatic reversal and remand*"].)

But even if a showing of prejudice was required, there is ample evidence of prejudice in this case. The trial court's failure to follow the correct procedure for issuing a statement of decision deprived plaintiff of an opportunity to object to defendants' proposed statement of decision and possibly obtain a hearing on those objections. Moreover, because the statement of decision did not exist at the time plaintiff designated the record on appeal, plaintiff had no reason to, and did not, designate a record sufficient to allow her to challenge the judgment on the merits because she was entitled to per se reversal for the trial court's failure to issue a statement of decision. That a signed statement of decision ultimately was included in the record on appeal—because the defendants improperly designated a document that was not yet in existence—does not justify depriving plaintiff of the opportunity to challenge the judgment on the merits.

***E. Reversal Would Not Be An Idle Act***

The majority state that reversal would be an idle act because "[o]ur decision on the merits of the appeal would be entitled to res judicata effect." (Maj. opn. *ante*, at p. 5.) But plaintiff in this appeal raised a single issue—the failure of the trial court to file a statement of decision—and thus our review must be limited to that issue. Moreover, if we reversed on that issue and remanded the case, our decision would not constitute a final judgment on the merits, because we would order further action to be taken,

culminating in the entry of a judgment from which plaintiff could appeal. Therefore, plaintiff would not be precluded from raising issues regarding the merits of the case in a subsequent appeal because there would not yet have been a final judgment and none of the issues on the merits could—or should—have been decided in this appeal. (*Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal.4th 888, 896 [res judicata "describes the preclusive effect of a final judgment on the merits"]; *Le Parc Community Assn. v. Workers' Comp. Appeals Bd.* (2003) 110 Cal.App.4th 1161, 1171 [issue preclusion "applies only if the decision in the initial proceeding was final and on the merits and the issue sought to be precluded from relitigation is identical to that decided in the first action and was actually and necessarily litigated in that action"].)

***F. Conclusion***

In light of the above, I would reverse the judgment and remand the matter to allow the trial court to issue a statement of decision and judgment in compliance with section 632 and Rule 232. (*Miramar Hotel Corp. v. Frank B. Hall & Co.*, *supra*, 163 Cal.App.3d at p. 1130.) Following the issuance of the statement of decision and judgment, plaintiff would be entitled to address the merits of the case on appeal on a complete record.

MOSK, J.